

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

958

Joint Appendix

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 14 1967

Nathan J. Panken
Clerk

United States Court Of Appeals

For The District Of Columbia Circuit

William R. Smith,

Appellant

versus

United States of America,

Appellee

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:
:
:
:
:

Case Number 21121

Appeal from Order Dismissing Complaint

with Prejudice in

The United States District Court

For The District Of Columbia

Names And Addresses of Counsel

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Appellant Pro Se

724 3rd Street, Northwest

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Washington, D. C.

Table Of Contents*

Subject	Page
Docket Entries	1
Complaint	2
Motion for Injunction (p)	8
Request for Temporary Injunction (p)	11
Motion for Declaratory Judgment (p)	12
Affidavit in Support of Motion for Declaratory Judgment (p)	13
Order Denying Motion for Declaratory Judgment	19
Amendment to Complaint	20
Motion to Dismiss (d)	21
Memorandum of Law (Page 4, Paragraph 2) (d)	22
Clarification of Issues (p)	23
Order Dismissing Complaint	26
Notice of Appeal (p)	27

*Abbreviations

- (p) plaintiff - appellant
(d) defendant - appellee

Docket Entries

In The United States District Court

Complaint, filed 1-16-67

Motion of plaintiff for injunction, filed 1-16-67

Request of plaintiff for temporary injunction,
filed 1-16-67

Motion of plaintiff for declaratory judgment, with
accompanying affidavit filed 2-13-67

Order denying motion of plaintiff for declaratory
judgment, entered 2-27-67

Amendment To Complaint, filed 3-2-67

Motion of defendant to dismiss, filed 3-24-67

Reply of plaintiff to defendant's motion to dismiss,
filed 3-27-67

"Memorandum of Law" in support of defendant's motion
to dismiss, filed 3-31-67

"Clarification of Issues" by plaintiff, filed 4-6-67

Order dismissing complaint with prejudice,
entered 4-6-67

Notice of appeal of plaintiff, filed 6-1-67

United States District Court
For The District Of Columbia

William R. Smith,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil Action Number
	)	
United States Government	)	109 '67
	)	
Defendant	)	

Complaint For Injunction

I, William R. Smith, hereafter designated as the plaintiff, residing at 724 3rd Street, Northwest, Apartment 406, do charge the United States Government with contributing to a conspiracy which has resulted in direct loss of income to me.

On November 26, 1963 the plaintiff published a literary work entitled The Green Mirror which is essential evidence in establishing the fact that President John Fitzgerald Kennedy was killed as the result of an organized plot. Two thousand copies of the work were printed, of which 300 copies were ultimately sold and approximately 400 more were given away pursuant to various promotional and advertising schemes. Financially, The Green Mirror was a total loss.

A copy of the above mentioned work was sent to

the President's Commission on The Assassination of President Kennedy. Nevertheless, the Commission found officially that there was no evidence of conspiracy in the assassination of President Kennedy.

The Commission also found that a man, Lee Harvey Oswald, acting alone, did commit the assassination.

The Commission made these findings in spite of the fact that the evidence presented before it indicated that:

(1) Lee Harvey Oswald was not involved in the assassination of President Kennedy.

(2) President Kennedy was killed as the result of an organized plot.

(3) The shot which killed President Kennedy was fired by Mrs. Jacqueline Kennedy.

Further, persons connected with the Justice Department did conspire to suppress evidence in the assassination and to distort the meaning of evidence presented before the Commission.

On July 8th, 1965 the plaintiff published a work entitled The Acts Of The Apostates which further developed the theme of conspiracy in the Kennedy assassination. Approximately 30 copies were sold and approximately 150 more were given away pursuant to

United States District Court
For The District Of Columbia

William R. Smith,	)	
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Further, persons connected with the Justice Department did conspire to suppress evidence in the assassination and to distort the meaning of evidence presented before the Commission.

On July 8th, 1965 the plaintiff published a work entitled The Acts Of The Apostates which further developed the theme of conspiracy in the Kennedy assassination. Approximately 30 copies were sold and approximately 150 more were given away pursuant to

various promotional and advertising schemes.

On May 23rd, 1966 the plaintiff published a book entitled Assassination By Consensus, which is the most complete and the most accurate account of the Kennedy assassination ever published. One hundred copies of this work were printed originally of which approximately 60 copies were sold and approximately 20 more were given away pursuant to various promotional and advertising schemes. A second printing of 475 copies was made and the remainder of the first printing was discarded in favor of the more professional second printing. Approximately 25 copies have been sold from the second printing.

On August 22, 1966 an advertisement appeared in the Washington Post and Times Herald relating to a work entitled Rush To Judgment. From August unto the present Rush To Judgment has dominated the national best seller list. The work is based on an erroneous interpretation of the evidence of conspiracy in the Kennedy assassination and this interpretation is made credible precisely as a result of the fact that the published findings of the President's Commission are at variance with any reasonable interpretation of the evidence presented to it.

The free press and the good sense of the American people will eventually expose the errors of Rush To Judgment.

In the meantime, a situation has been created which places the plaintiff at a competitive disadvantage. Heavily financed publications, taking advantage of the public interest in this subject, disseminate error after error to hungry readers. The plaintiff, on the other hand, whose capital reserve is entirely dependent upon money earned from a job which has nothing to do with publishing, must rely upon systematic advertising before a limited audience until such time as he has the financial resources to promote his work on a larger scale.

On Friday, January 13, 1967, the plaintiff was informed by Mr. William Brower—— who works in the auditing department of the O'Donnell's Sea Grill located at 1228 E Street, Northwest (District of Columbia) where the plaintiff is employed as a waiter—— that the Internal Revenue had placed a levy against the plaintiff's salary in order to liquidate a tax liability of \$135.00. Previously the plaintiff had informed the Internal Revenue Service that he was not in a position to pay the tax and that he was

willing to come to the District office to discuss the matter. The response of the Internal Revenue Service was to send a notice of possible seizure which was followed by the action mentioned above.

As implied above, the reason the plaintiff is in no position to discharge this obligation is that he is attempting to operate a business on very limited resources—a business, the expansion of which has limited largely as a result of the illegal activities of the United States Government.

The plaintiff entered the publishing business with no thought in mind of the possible assassination of an American President. Nor did he remain in the publishing business for the specific purpose of exploiting the sinister aspects of the Kennedy Assassination. His purpose was and remains to earn the best possible honest living that he is capable of in accordance with his abilities.

If circumstances force him to bring out the sordid aspects of the Kennedy assassination in an argument of this fashion, they are not of his making. At the very least, he has written a modest account of the Kennedy assassination and the only account that is based on the most authentic information a-

He did not invent tales of people hiding on hills and behind bushes simply to satisfy the appetite of a curious public.

The plaintiff therefore moves that the Bureau of Internal Revenue be enjoined from interference with any income entitled to him until such time as he has sufficient independent capital to promote the sale of the work Assassination By Consensus; or, alternately, until the Government of the United States adjusts its official findings in connection with the Kennedy assassination to correspond with the evidence.

In addition, the plaintiff moves, should the Government elect the latter course, that a reasonable time be allowed him to adjust any settlement with the Internal Revenue Service to a schedule that takes into account obligations that he has already incurred.

(Signed) William R. Smith
Plaintiff

Motion For Injunction

Whereas on November 26, 1963 the plaintiff published a book entitled The Green Mirror which is essential evidence in establishing the fact that President John Fitzgerald Kennedy was killed as the result of an organized plot.

Whereas the above mentioned work was sent to the President's Commission on the Assassination of President Kennedy after that body had begun its deliberations.

Whereas the President's Commission stated officially that there was no evidence of conspiracy in relation to the Kennedy assassination.

Whereas persons associated with the Justice Department did conspire to suppress evidence in the assassination of President Kennedy and to distort the meaning of evidence presented before the Commission.

Whereas on July 8, 1966 the plaintiff did publish a literary work entitled The Acts of The Apostates which further developed the theme of conspiracy in the Kennedy assassination.

Whereas on May 23rd, 1966 the plaintiff did publish a literary work entitled Assassination By Consensus which establishes facts of the Kennedy as-

sassination at variance with the findings of the President's Commission.

Whereas the sale and promotion of this work have been inhibited as a result of illegal activities on the part of the United States Government.

Whereas the Internal Revenue Service has made a levy against the plaintiff's salary making the sale and promotion of Assassination By Consensus even more difficult.

Whereas the above facts are stated in a civil action filed with this court.

The plaintiff moves that the Bureau of Internal Revenue be enjoined from interference with any income entitled to him until such time as he has sufficient independent capital to promote the sale of the work Assassination By Consensus; or, alternately, until the Government of the United States adjusts its official findings in connection with the Kennedy assassination to correspond with the evidence.

In addition, the plaintiff moves, should the Government elect the latter course, that a reasonable time be allowed him to adjust any settlement with the Internal Revenue Service to a schedule which takes into account obligations that he has already

incurred.

(Signed) William R. Smith
Plaintiff

January 16, 1967

Request For Temporary Injunction

Whereas the Internal Revenue Service has made a levy against the salary of the plaintiff.

Whereas the plaintiff has filed a civil action contesting the action of the Internal Revenue Service.

The plaintiff asks that the Internal Revenue Service be temporarily enjoined from interference with any income due him until such time as the preliminary arguments in the above mentioned cause can be heard in this court.

The plaintiff also asks that the Internal Revenue Service be required to refund any income already seized pending the outcome of the preliminary hearing.

(Signed) William R. Smith
Plaintiff

January 16, 1967

Motion For Declaratory Judgment

Whereas William R. Smith, the petitioner in the above entitled action, filed a complaint on January 16th, 1967 alleging conduct on the part of the defendant injurious to the petitioner.

Whereas the petitioner complains of additional injuries to the petitioner resulting from actions by the defendant.

Whereas all of the grievances of the petitioner as hereinabove expressed are set forth and explained in detail in the affidavit accompanying this motion.

The petitioner asks a declaratory judgment against the defendant granting relief to the petitioner in the sum of one hundred thousand dollars (\$100,000.00).

(Signed) William R. Smith
Plaintiff

February 13, 1967

Affidavit In Support Of
Petitioner's Motion For Declaratory Judgment

A complaint was filed in this Honorable Court by the petitioner in the above entitled action, William R. Smith, on January 16, 1967 alleging conduct on the part of the defendant, injurious to the petitioner, herein set forth and described as follows.

On or shortly after September 24, 1964, the United States Government, under the seal of the President of the United States, published a report entitled "Report Of The President's Commission On The Assassination Of President Kennedy".

Among the conclusions to be found in the Report were the following:

(1) A man, Lee Harvey Oswald, acting alone, did commit the assassination of President Kennedy.

(2) There was no evidence of conspiracy, foreign or domestic, in relation to the assassination of President Kennedy.

These conclusions were contained in the Report in spite of the fact that the petitioner sent to the President's Commission on The Assassination of President Kennedy, hereafter referred to as the Commission, a copy of "The Green Mirror" along with an

appropriate explanation. "The Green Mirror" is a literary work, written and published by the petitioner, which when considered along with the appropriate explanation furnished the Commission by the petitioner, constitutes prima facie evidence of conspiracy in the assassination of President Kennedy. Further, sufficient evidence was presented to the Commission, in addition to and independently of "The Green Mirror" to establish the fact that President Kennedy was killed as the result of an organized plot.

The petitioner also alleged that persons connected with the Justice Department of the United States did conspire to suppress evidence relating to the assassination of President Kennedy and to distort the meaning of evidence presented to the Commission. Specifically, the petitioner was referring to a report issued by the Department of Justice on June 3rd, 1964 relating to an investigation of allegations contained in a book entitled "Who Killed Kennedy (?) " by Thomas H. Buchanman.

The petitioner alleged that the above described activities on the part of the defendant had an inhibiting effect on the sale of three successive literary works written and published by the petitioner

entitled respectively: (1) "The Green Mirror"; (2) "The Acts Of The Apostates"; and (3) "Assassination By Consensus"; thus causing to the petitioner direct loss of income.

Petitioner also alleged that the loss of income resulting from the above described actions on the part of the defendant created a condition in which the petitioner was in no position to discharge completely the petitioner's Federal income tax liability for the year 1965; whereupon, on January 13, 1967 the petitioner was informed that a levy had been instituted against the petitioner's salary by the Internal Revenue Service to liquidate the remainder of the petitioner's Federal income tax liability for the year 1965.

The petitioner sought relief as follows:

(1) Petitioner sought a preliminary injunction to enjoin the Internal Revenue Service from proceeding with the levy against the petitioner's salary.

(2) Petitioner sought a refund of money to the petitioner that had been seized by the Internal Revenue Service pursuant to said levy.

(3) Petitioner sought an injunction to enjoin the Internal Revenue Service from interference with

any income to which the petitioner should be entitled until such time as the petitioner should be in a position to independently promote the sale of the last of the above named publications of the petitioner, "Assassination By Consensus"; or alternately; until such time as the Commission should adjust its findings in relation to the Kennedy assassination to correspond with the evidence.

A hearing on the motion of the petitioner for a preliminary injunction was granted by this Honorable Court February 10, 1967 and the petitioner's motion was denied, the court not regarding as pertinent the fact that the petitioner's inability to discharge the petitioner's Federal income tax liability for the year 1965 resulted from a series of actions on the part of the defendant at such a time when the petitioner was not held liable to any indebtedness to the Internal Revenue Service.

Whereupon, the petitioner concludes - since it is commonly held that taxes must be paid before equitable can be granted on complaint of taxpayer - that there is no remedy at law for the petitioner against the activities of the Internal Revenue Service and the petitioner therefore leaves the disposal of

any pending motion of the petitioner from January 16th, 1967 to the discretion of the defendant and this Honorable Court.

For a further, second, separate and distinct cause of action, petitioner alleges:

(1) Petitioner repeats and realleges as part of this cause of action, all the allegations contained in the original brief as hereinabove set forth.

(2) Petitioner alleges that in addition to loss of income the petitioner suffered a loss of capital gains as a result of the above named and described activities of the defendant.

(3) Petitioner alleges that the defendant knowingly and willfully created the basis for controversy on the subject of the assassination of President Kennedy which resulted in the development of an industry functioning in direct competition with the petitioner.

(4) Petitioner alleges that the defendant contributed directly to the petitioner's loss of reputation for solvency.

(5) Petitioner alleges that the actions of the defendant perpetrated a condition in which the peti-

tioner was forced to live for an extended period on a standard far lower, from an economic standpoint, than that which the petitioner would have enjoyed had the relevant actions of the defendant not taken place.

(6) Petitioner alleges that through various subterfuges and furtive devices the defendant compounds all the petitioner's grievances as hereinabove set forth and adds to the injuries suffered by the petitioner.

Where in consideration of the grievances of the petitioner hereinabove set forth, the petitioner asks a declaratory judgment granting relief in the sum of one hundred thousand dollars (\$100,000.00) to the petitioner on the condition that any question of fact or facts relating to the material contained in this affidavit and arising on challenge by the defendant be first properly determined in this court.

Petitioner deems the remedy prayed for sufficient at law to preclude further litigation on the initiative of the petitioner in relation to the above entitled action or any controversies arising therefrom.

(Signed) William R. Smith
Plaintiff

February 13, 1967

Order

Upon consideration of the motion of plaintiff for declaratory judgment filed herein 2-13-67, it is this 27th day of February, 1967, ordered that the said motion be, and the same hereby is denied.

Robert M. Stearns, Clerk

By Sheila Hagen
Deputy Clerk

Matthew F. McGuire
Presiding Judge

Amendment To Complaint

(1) The petitioner in the above entitled action amends his complaint so that:

(A) The petitioner's affidavit filed in this court on February 13, 1967 and entitled "Affidavit In Support Of Petitioner's Motion For Declaratory Judgment" be hereafter incorporated into the original complaint.

(B) The motion for declaratory judgment be stricken from said affidavit.

(C) The case be heard on its merits as a case for equity under the Tort Claims Act.

(D) The character of the relief sought be changed from injunctive relief to that of a financial judgment against the defendant in the sum of two hundred and fifty thousand dollars (250,000.00).

(2) Since no new allegations are made herein, the petitioner asks that no extension of time be granted the defendant to reply on the merits of petitioner's allegations.

March 2, 1967 (Signed) William R. Smith
 Plaintiff

Motion To Dismiss

The United States of America, by its attorney, David G. Bress, United States Attorney for the District of Columbia, pursuant to the authority of Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, moves the Court for an order dismissing the complaint herein, as amended, with prejudice, on the grounds that the Court lacks jurisdiction over the subject matter and the plaintiff has failed to state a claim for which relief can be granted.

(Signed) Mitchell Rogovin
Assistant Attorney General
Tax Division

(Signed) Fred B. Ugast
Chief, General Litigation
Section

(Signed) Robert E. Ferguson
Attorney, General Litigation
Section

(Signed) David G. Bress
United States Attorney
Of Counsel

Memorandum Of Law

(Page 4, Paragraph 2) ... Whatever the basis for plaintiff's complaint with regard to the aforementioned federal tax levies, it is clear that the Court would not have jurisdiction over such a complaint. 28 U. S. C., Section 2680(a) states:

The provisions of this chapter and section shall not apply to ...

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer.

...

(Signed) Mitchell Rogovin
Assistant Attorney General
Tax Division

(Signed) Fred B. Ugast
Chief, General Litigation
Section

(Signed) Robert E. Ferguson
Attorney,
General Litigation Section

(Signed) David G. Bress
United States Attorney
Of Counsel

Clarification of Issues

(1) In respect to the above entitled action, complaint did not arise and does not rest "in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer."

(A) Paragraph 1 of the original complaint states, "I, William R. Smith, hereafter designated as the plaintiff, ... do charge the United States Government with contributing to a conspiracy which has resulted in direct loss of income to me."

(B) The complaint did arise out of the fact that President Kennedy was killed as the result of an organized plot, involving private persons, which compromised the personal and property rights of the plaintiff and that the failure of the Government to act on the evidence of conspiracy left the plaintiff in a state of financial distress.

(2) While jurisdiction for the entertainment of the suit, as amended, does rest on Title 28 U.S.C., Section 1346 (b), the exemptions cited by the defendant under Title 28 U.S.C., Section 2680 (a) do not

restrict the power of the court to entertain a suit of this nature. In Panella v. United States, (216 F. 2d, 622) the United States Court of Appeals for The Second Circuit held that "the object of the court in construing the meaning of the Tort Claims Act should be to read the act so as to make it consistent and equitable, in which the court should be untrammelled by any rule of strict or liberal construction.

(3) In asserting a claim under Section 1346 (b), the legitimacy of the plaintiff's claim is based upon the facts that:

(A) The erroneous conclusions of the Warren Commission created an official barrier to recovery from private persons by the plaintiff for personal injuries that he had already suffered inasmuch as the assassination itself resulted from a conspiracy involving private parties and did injury to the rights and property of the plaintiff.

(B) As stated in the plaintiff's oral argument before the Court (although the plaintiff does not necessarily ask that judicial notice be taken of the argument), members of the Warren Commission did collaborate with Mark Lane, author of Rush To Judgment,

to introduce into the official record an exhibit entitled "Helen Markham, Exhibit Number 1", which rendered completely without merit the contention that Lee Harvey Oswald was the slayer of Officer J. Tippit. The Warren Report nevertheless stated that the evidence supported the contention that Lee Harvey Oswald was the slayer of Officer J. Tippit. This collaboration, then, served to endow the book Rush To Judgment with an authority which it would not normally have possessed and diverted a major portion of the literary market to the detriment of the plaintiff.

(4) It is the latter allegation, an allegation of tortfeasance within the meaning of the statute, still remaining to be proved by the plaintiff, upon which the plaintiff has assessed the value of his claim for liquidated damages.

(5) Liability of the United does not rest upon the malfeasance of its employees, but upon the official conclusions of the Warren Report resulting from the failure of the Commission members to exercise due care in the execution of Executive Order Number 11130 of November 29, 1963.

4-6-67

(Signed) William R. Smith
Plaintiff

Order

After due consideration of defendant's motion to dismiss, together with the memorandum in support thereof, and after further consideration of the pleadings filed herein, it is hereby

ORDERED that the complaint, as amended, be and it is hereby, dismissed with prejudice.

(Signed) Bernita S. Matthews
United States District
Judge

4-6-67

Notice Of Appeal

(1) Notice is hereby given that William R. Smith, the plaintiff in the above entitled action, hereby appeals to the United States Court of Appeals for the District of Columbia from the order dismissing the complaint with prejudice, entered in this action on April 6, 1967.

6-1-67

(Signed) William R. Smith
Plaintiff

Brief For Appellant

RECEIVED
JAN 14 1967

JAN 14 1967

United States Court Of Appeals
For The District Of Columbia Circuit

William R. Smith,	:	
	:	
Appellant	:	
	:	
versus	:	Case Number 21121
	:	
United States of America,	:	
	:	
Appellee	:	

Appeal from Order Dismissing Complaint
with Prejudice in

The United States District Court
For The District Of Columbia

Names And Addresses of Counsel

William R. Smith,	:	724 3rd Street, Northwest
	:	
Appellant Pro Se	:	Apartment 406
	:	
	:	Washington, D. C. 20001
	:	
Richard M. Roberts,	:	
	:	
Esquire	:	United States Department
	:	
And	:	of Justice
	:	
Lee A. Jackson,	:	RMR: LAJ: FXGrossi: mae
	:	
Esquire	:	5 - 16 - 623
	:	
Attorneys For Appellee	:	Washington, D. C.

Statement Of Question Presented

The question is whether in a suit brought against the United States because of injuries suffered by appellant growing out of failure of the United States to act on the evidence of conspiracy in the assassination of President Kennedy, the case should have been dismissed and dismissed with prejudice on unspecified grounds before a hearing had been granted on the merits of the action.

William R. Smith,

Appellant

versus

United States Of America

Appellee

Subject Index

Subject	Page
Jurisdictional Statement	1
Statutes, Regulations, and Rules Involved ...	12
Statement of Points	19
Summary of Argument	22
Argument	26

References	Page
Borchard's <u>Declaratory Judgments</u> , First Edition	28
Corpus Juris Secundum	36

Table Of Cases

1. Aralac, Inc. v. Hat Corporation of America, 166 F. 2d 286; cited on Page 27.
2. * Chisholm v. Gilmer, 299 U. S. 99; cited on Pages 35 and 36.
3. Federal Looseleaf Corporation v. Woodhouse Stationary Company, 163 F. Supp. 482; cited on Page 35.
4. Glo Company v. Murchison, 208 F. 2d 714; cited on Page 41.
5. Hackner et al v. Guaranty Trust, 117 F. 2d

95; cited on Page 35.

6. Hill - Lanham, Inc. v. Lightview Development Corporation, 163 F. Supp. 475; cited on Page 35.

7. Hovey v. Elliot, 167 U. S. 409; cited on Page 38.

8. * Panella v. U. S., 216 F. 2d 622; cited on Pages 32 and 33.

9. * Societe Internationale v. Rogers, 312 U. S. 322; cited on Page 40.

10. Topping v. Fry, 117 F. 2d 95; cited on 42.

11. Treemond Company v. Schering, 122 F. 2d 702; cited on Page 28.

12. United States v. Association of American Railroads, 4 F. R. D. 510; cited on Page 34.

13. Windsor v. McVeigh, 93 U. S. 274; cited on Pages 39 and 40.

*Cases or authorities chiefly relied upon are marked by asterisks.

Statutes, Regulations, And Rules Cited

(1) Act of July 1, 1861, c. 33, 12 Stat. 284, as revised, U. S. C. A. Title 42, Section 1985; cited on Pages 2 and 12.

(2) Act of June 25, 1948, c. 646, Section 1, 62 Stat. 964, as revised, U. S. C. A. Title 28, Section 2201; cited on Pages 5, 12, 19, and 27.

(3) Act of June 25, 1948, c. 646, 62 Stat. 933, as revised, U. S. C. A. Title 28, Section 1346 (a,b); cited on Pages 4, 5, 13, 19, 30, 31, 32, 33, and 42.

(4) Act of June 25, 1948, c. 646, Section 1, 62 Stat. 984, U. S. C. A. Title 28, Section 2680 (h); cited on Pages 14 and 32.

(5) Act of June 25, 1948, c. 646, Section 1, 62 Stat. 932, as revised, U. S. C. A. Title 28, Section 1343; cited on Pages 2 and 14.

(6) Act of September 6, 1966, P. L. 89 - 554, Section 1, 80 Stat 392, U. S. C. A. Title 5, Sections 703 and 704; cited on Pages 1, 15, 19, and 26.

(7) Federal Rules of Civil Procedure: Rule 8 (a), cited on Pages 16 and 26; and Rule 54 (c) cited on Pages 16, 24, and 36.

(8) Executive Order Number 11130; cited on Pages

3, 16, 10, and 33.

Jurisdictional Statement

The District Court had jurisdiction over the subject matter of the original complaint by virtue of the Act of September 6, 1966, P. L. 89-554, Section 1, 80 Stat. 392, U. S. C. A. Title 5, Section 704, which states: "Agency actions made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

The complaint (JA 2) charges that the Warren Commission, created by Executive Order Number 11130 of November 29, 1963 to investigate the assassination of President Kennedy, failed to develop conclusions which corresponded to the evidence presented to it; and the plaintiff asked as one of the alternative remedies that the United States alter its official findings in relation to the Kennedy assassination to correspond with the evidence. Quite obviously there was no alternative to judicial review since the Warren Commission was no longer in existence when the action was commenced.

Section 703 of Title 5 U. S. C. A. , P. L. 89-554 (supra), designates the forum for a proceeding of the type discussed as "... a court specified by

statute ..." or "... a court of competent jurisdiction." In either case this would include the District Court since by the Act of June 25, 1948, c. 646, Section 1, 62 Stat. 932; September 3, 1954, c. 1263, Section 42, 68 Stat. 1241; September 9, 1957, P. L. 85 - 315, U. S. C. A. Title 28, Section 1343: "The District Court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) to recover damages for injuries to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42,"

Such a conspiracy, cognizable under the above statute, would exist "if two or more persons in any State or territory conspire to prevent by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are

required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties." (Act of July 31, 1861, c. 33, 12 Stat. 284; April 20, 1871, c. 22, Section 2, 17 Stat. 13; R. S. 1980; U. S. C. A. Title 42, Section 1985.)

Thus it is sufficient for the Court's jurisdiction to state that the cause of action derived from acts committed in furtherance of a conspiracy to assassinate the President of the United States.

Finally, the District Court had jurisdiction over the complaint because the United States was named as defendant in an action contesting a final action of an agency of the Executive Department. The agency in question, the Warren Commission, was no longer in existence when this action was filed, but the scope of its authority can be ascertained from this portion of Executive Order Number 11130: "All Executive departments and agencies are directed to furnish the Commission with such facilities, services and cooperation as it may request from time to time."

The Court's jurisdiction over the original complaint in the final instance was based upon the Act of June 25, 1948, c. 646, 62 Stat. 933; as amended October 31, 1951, c. 655, Section 50 (b), 65 Stat. 727; July 30, 1954, c. 648, Section 1, 68 Stat. 589; July 7, 1958, P. L. 85 - 508, Section 12 (e), 72 Stat. 348; August 30, 1964, P. L. 88 - 519, 78 Stat. 699; November 2, 1966, P. L. 89 - 719, Title II Section 202 (a), 80 Stat. 1148; U. S. C. A. Title 28 Section 1346 (a) which states in part: "The District Court shall have original jurisdiction, concurrent with the Court of Claims, of

"... (2) any ... civil action or claim against the United States, not exceeding \$10,000.00 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The District Court had jurisdiction over the motion for declaratory judgment upon waiver by the plaintiff - appellant of all motions pertaining to Federal taxes in his affidavit accompanying said motion. Jurisdiction in this instance was based upon

the Act of June 25, 1948, c. 646, Section 1, 62 Stat. 964, revised May 24, 1949, c. 139, Section 111, 63 Stat. 105; U. S. C. A. Title 28, Section 2201; which states: "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration, whether or not such relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and shall be reviewable as such."

(The motion for declaratory judgment and the affidavit in support thereof are to be found in the Joint Appendix at JA 12 and JA 13 respectively.)

The District Court had jurisdiction over the amended complaint under the Act of June 25, 1948, c. 646, 62 Stat. 933, as amended and revised to November 2, 1966 into P. L. 89 - 719, Title II, Section 202 (a), 80 Stat. 1148; U. S. C. A. Title 28 Section 1346 (b); which states in part: "Subject to the provisions of Chapter 171 of this title ... the district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945

for injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The basis for the Court's jurisdiction under the above Act is explained in the pleading "Clarification of Issues" in the Joint Appendix at JA 23.

Since this is an appeal from a final order of the District Court dismissing the complaint with prejudice, the Appellate Court has jurisdiction under the Act of June 25, 1948, c. 646, Section 1, 62 Stat. 929; as amended and revised to July 7, 1958 into P. L. 85 - 508, Section 12 (e), 72 Stat. 348; U. S. C. A. Title 28, Section 1291. (The relevant order is to be found in the Joint Appendix at JA 26.)

Statement Of Case

Plaintiff - appellant brought action in the United States District Court for The District of Columbia against the United States for relief from injuries suffered by appellant growing out of failure of the United States to act on the evidence of conspiracy in the assassination of President Kennedy.

The complaint (JA 2) alleged:

(1) that the appellant published a literary work entitled The Green Mirror which, when considered with an appropriate explanation, constitutes prima facie evidence of conspiracy in the assassination of President Kennedy; and that the appellant sent a copy of said literary work to the President's Commission on The Assassination of President Kennedy after that body had begun its deliberations;

(2) that the Commission stated in its official conclusions that there was no evidence of conspiracy in the assassination of President Kennedy and that a man, Lee Harvey Oswald, acting alone, did commit the assassination;

(3) that the Commission arrived at these conclusions in spite of the fact that the evidence to it indicated that,

(a) Lee Harvey Oswald was not involved in the assassination of President Kennedy,

(b) President Kennedy was killed as the result of an organized plot,

(c) the shot which killed President Kennedy was fired by Mrs. Jacqueline Kennedy;

(4) that the sale of The Green Mirror was inhibited because of circumstances growing out of the plot to kill President Kennedy and the conclusions reached by the President's Commission.

The complaint also alleged that the appellant published two additional literary works (The Acts Of The Apostates and Assassination By Consensus), both dealing with the subject of the assassination, and that the sale of these works was inhibited for causes similar to those that contributed to the failure of The Green Mirror.

Appellant contended that as a result of the above circumstances he was unable to discharge completely his Federal income tax liability for the year 1965 and asked that the Internal Revenue Service be enjoined from proceeding with a tax levy against his salary instituted to recover on said lia-

bility. Appellant asked as an alternative remedy that the United States alter its official conclusions in relation to the Kennedy assassination to correspond with the evidence.

A 15 minute hearing was granted on a motion for preliminary injunction by the appellant and the motion was denied. Appellant then moved for a declaratory judgment (JA - 12) granting relief of \$100,000.00 and filed an affidavit in support thereof waiving all motions with respect to Federal taxes (JA - 13) and alleging additional personal and private injuries. The motion was denied before a responsive pleading had been served although the appellant made no motion for summary judgment. Appellant amended the original complaint (JA - 20) with a tort claim asking liquidated damages in the amount of \$250,000.00. Appellee moved to dismiss the action on the grounds that the Court lacked jurisdiction over the subject matter and that the appellant failed to state a claim for which relief could be granted. The motion (JA - 21) was for a dismissal with prejudice and was supported by a subsequent pleading entitled Memorandum of Law, of which an excerpt appears in the Joint Appendix at JA 22.

Appellant filed a statement asserting the basis for his claim as follows:

(1) The assassination of President Kennedy was the result of an organized plot which did injury to the rights and property of the appellant and the Conclusions of the Commission's report created an official barrier to recovery by the appellant.

(2) Members of the President's Commission collaborated with Mark Lane to introduce into the official record an exhibit entitled Helen Markham, Exhibit Number 1 which rendered completely without merit the contention that Lee Harvey Oswald was the assassin of Officer J. Tippit. Yet the Commission identified Lee Harvey Oswald as Officer Tippit's slayer. This collaboration served to endow Mr. Lane's book, Rush To Judgment with an authority that it would not normally have possessed and diverted a major portion of the literary market to the detriment of the appellant.

(3) Liability of the United States rests upon the erroneous conclusions of the President's Commission, resulting from the failure of the members of the Commission to exercise due care in the execution of Executive Order Number 11130 of November 29, 1963.

The basis for the assessment of the value of appellant's tort claim along with the foregoing allegations are to be found in the pleading Clarification Of Issues contained in the Joint Appendix at JA 23.

Upon filing by the appellant of the pleading mentioned above, the motion of appellee to dismiss with prejudice was granted and appellant filed notice of appeal to this court.

Statutes, Regulations, and Rules Involved

Act of July 1, 1861, c. 33, 12 Stat. 284; April 20, 1871, c. 22, Section 2, 17 Stat. 13, R. S. 1980; U. S. C. A. Title 42, Section 1985: "If two or more persons in any State or territory conspire to prevent by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, hinder, or impede him in the discharge of his official duties; ... etc. ..."

Act of June 25, 1948, c. 646, Section 1, 62 Stat. 964, as revised May 24, 1949, c. 139, Section 111, 63 Stat. 105; U. S. C. A. Title 28, Section 2201: "In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of

an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not such relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and shall be reviewable as such."

Act of June 25, 1948, c. 646, 62 Stat. 933 as revised to November 2, 1966 into P. L. 89 - 719, Title II, Section 202 (a), 80 Stat. 1148, U. S. C. A. Title 28, Section 1346:

(a) The District Court shall have original jurisdiction, concurrent with the Court of Claims, of,

(2) any ... civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(b) Subject to the provisions of Chapter 171 of this title ... the district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or death caused by the negligent or

act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Act of June 25, 1948, c. 646, Section 1, 62 Stat. 984; U. S. C. A. Title 28, Section 2680 (h): "The provisions of ... Section 1346 (b) shall not apply to ... (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

Act of June 25, 1948, c. 646, Section 1, 62 Stat. 932 as revised to September 9, 1957 into P. L. 85 - 315, Part III Section 121, 71 Stat. 637, U. S. C. A. Title 28, Section 1343: "The District Court shall have original jurisdiction of any civil action authorized by law to be commenced by any person ... (1) to recover damages for injuries to his person or property, or because of the deprivation of any right or privilege of a citizen of

the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42; ..."

Act of September 6, 1966, P. L. 89 - 554, Section 1, 80 Stat 392; U. S. C. A. Title 5, Sections 703 - 704:

(703) Form and venue of proceeding. The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute, or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(704) Actions reviewable. Agency actions made reviewable by statute and final agency actions for which there is no other adequate remedy in a court are subject to judicial review.

Federal Rules of Civil Procedure.

Rule 8(a). Claims For Relief. A pleading which sets forth a claim for relief, ... shall contain a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, ...

Rule 54(c). Demand For Judgment. ... Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Executive Order Number 11130 of November 29, 1963.

Pursuant to the authority vested in me as President of the United States, I hereby appoint a Commission to ascertain, evaluate and report upon the facts relating to the assassination of the late President John F. Kennedy and the subsequent violent death of the man charged with the assassination. The Commission shall consist of --

The Chief Justice of the United States,
Chairman;

Senator Richard B. Russell;
Senator John Sherman Cooper;
Congressman Hale Boggs;
Congressman Gerald R. Ford;
The Honorable Allen W. Dulles;
The Honorable John J. McCloy

The purposes of the Commission are to examine the evidence developed by the Federal Bureau of Investigation and any additional evidence that may hereafter come to light or be uncovered by federal or state authorities; to make such further investigation as the Commission finds desirable; to evaluate all the facts and circumstances surrounding such assassination, including the subsequent violent death of the man charged with the assassination, and to report to me its findings and conclusions.

The Commission is empowered to prescribe its own procedures and to employ such assistants as it deems necessary.

Necessary expenses of the Commission are to be paid from the "Emergency Fund for the President".

All Executive departments and agencies are directed to furnish the Commission with such facilities and cooperation as it may request from time

to time.

Lyndon B. Johnson

Statement Of Points

(1) Complaint should not have been dismissed for lack of jurisdiction since the District Court had jurisdiction over the subject matter of the original complaint under the Act of September 6, 1966, P. L. 89 - 554, Section 1, 80 Stat. 392, U. S. C. A. Title 5, Section 704; the District Court had jurisdiction over the motion for declaratory judgment by the Act of June 25, 1948, c. 646, Section 1, 62 Stat. 964, revised May 24, 1949, c. 139, Section 111, 63 Stat. 105, U. S. C. A. Title 28, Section 2201; and the District Court had jurisdiction over the amended complaint under the Act of June 25, 1948, c. 646, 62 Stat. 933 as revised into the Act of November 2, 1966, P. L. 89 - 719, Title II, Section 202 (a), 80 Stat. 1148, U. S. C. A. Title 28, Section 1346 (b).

(2) Complaint should not have been dismissed for failure to state a claim for which relief could be granted since plaintiff stated a valid claim within the meaning of the relevant statutes.

(3) Plaintiff having stated a valid claim and jurisdiction being conferred by statutes upon the District Court, complaint should not have been dismissed before the plaintiff had been granted an op-

portunity to establish his case.

(4) Complaint should not have been dismissed with prejudice since there had been no adjudication on the merits.

(5) Dismissal with prejudice was improper in an order which set forth no grounds for dismissal.

Summary Of Argument

This action was brought against the United States of America for relief to appellant from injuries suffered growing out of failure of the United States to act on the evidence of conspiracy in the assassination of President Kennedy. Appellant has averred that the sale of his three published literary works, The Green Mirror, The Acts Of The Apostates, and Assassination By Consensus, has been inhibited by the negligence of the Government on the one hand, and by the fact that agents of the United States contributed to furthering the conspiracy which resulted in the assassination of President Kennedy on the other.

The President's Commission on the assassination of President Kennedy submitted conclusions which were completely contrary to the evidence presented to it, and the Commission was out of existence at the time that this complaint was filed. However, since its conclusions reflect a final and official agency action, they are subject to judicial review. In the case at bar, a civil action growing out of acts committed in furtherance of a conspiracy to assassinate the President of the United States, the District

Court was the proper court of original jurisdiction in which the case should have been heard.

Since the Court had jurisdiction of the case, it was empowered upon the filing of an appropriate pleading by the appellant (which, incidentally, waived disposition of all motions with respect to Federal taxes) to declare the rights and legal relations of the parties to the case. When the Court, at its discretion, chose not to do this, appellant amended his complaint with a tort claim. Appellee filed a motion to dismiss and a subsequent pleading in support thereof entitled Memorandum Of Law.

Upon the filing of the pleading Memorandum Of Law by the appellee, appellant had a personal right to come into court and it was in response to this pleading that appellant particularized the allegations in support of his tort claim. Hence, the allegations were properly before the Court; and they (JA 23) were sufficient to establish the Court's jurisdiction to hear the amended complaint under U. C. C. A. Title 28, Section 1346 (b) (Statute given on Page 12).

Appellee's motion to dismiss set forth failure to state a claim for which relief could be granted as one of the grounds for dismissal.

In considering a motion to dismiss for failure to state a claim for which relief can be granted, the prayer for relief may be disregarded, since pursuant to Rule 54 (a) of the Federal Rules of Civil Procedure, except in a case of judgment by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled regardless of whether he has asked for the proper relief in his pleadings. And it is almost inconceivable that the Court could have granted no relief in a case of actual controversy within its jurisdiction.

Under the circumstances, then, the case should not have been dismissed before a hearing had been granted on the merits of the action since under Supreme Court decisions (Windsor v. McVeigh, 93 U. S. 274; Hammond Packing Co v. Arkansas, 212 U. S. 322) there are constitutional limitations on the power of courts, even in the aid of their own valid processes to dismiss an action without affording a party the opportunity to be heard on the merits of his cause.

Upon dismissal of an action without a hearing on the merits (an extreme remedy in the Federal Courts) generally the dismissal should be without prejudice.

In this case, even the question of jurisdiction was not raised by the Court and appellant is aware of no basis for a dismissal with prejudice.

In any event, it hardly needs to be argued that the order dismissing the complaint with prejudice should have set forth the grounds for dismissal.

Conclusion. The Attorney General is empowered by statute to settle any claim cognizable under U. S. C. A. Title 28, Section 1346 (b) (cited supra) by arbitration with the permission of the Court. In the absence of an appropriate request by the Attorney General, appellant asks that the case be remanded for a full hearing in the District Court.

Argument

(1) The complaint should not have been dismissed for lack of jurisdiction.

(A) The District Court had jurisdiction over the subject matter of the original complaint by virtue of the Act of September 6, 1966, P. L. 89 - 554, Section 1, 80 Stat. 392, U. S. C. A. Title 5, Section 704. Complaint alleged that the appellant suffered financial loss as a result of the failure of the President's Commission on the Assassination of President Kennedy to develop conclusions which corresponded to the evidence presented to it; and one of the remedies proposed was that the United States set its official conclusions in relation to the Kennedy assassination to correspond with the evidence. (See JA 2 et. seq.)

The matter of the Court's jurisdiction over the original complaint is dealt with in more detail in the jurisdictional statement and appellant considers this sufficient since the only purpose here is to overcome the appellee's objection to jurisdiction under Rule 8 (a) of the Federal Rules of Civil Procedure.

(B) The District Court had jurisdiction over

the motion for declaratory judgment by the Act of June 25, 1948, c. 646, Section 1, 62 Stat. 964, revised May 24, 1949, c. 139, Section 111, 63 Stat. 105, U. S. C. A. Title 28, Section 2201. Appellant feels that it is un-necessary to point out here the alternatives available to the District Court in relation to the motion for declaratory judgment with respect to relief since the motion was denied and the action is not dependent for its maintenance on the disposition of that motion.

However, it might be instructive at this point to explore the subject of why this means of pursuing the action was chosen in view of the fact that, to the present at least, appellee has admitted no valid claim for relief.

It was stated in an opinion delivered by District Judge Murphy, sitting in banc with two Circuit judges (Aralac, Inc. v. Hat Corporation of America, 166 F. 2d 286), "In form the Declaratory Judgment Act differs in no essential respect from any other action. The conditions of the usual action, procedural and substantive, must always be present, namely, the competence of jurisdiction over the parties and subject matter, the existence of op-

erative facts justifying the judicial declaration of legal consequences, the assertion against an interested party of rights capable of judicial protection, and a sufficient moving interest in the moving party to entitle him to invoke a judgment in his behalf.

"... The Court has emphasized that the Act should have a liberal interpretation bearing in mind its remedial character and legislative purpose."

Judge Clark in *Treemond Company v. Schering* (122 F. 2d 702) stated: "Some district courts seem to have found difficulty freeing themselves from the strait-jacket of the 'adversary' conception. They exhibit a tendency toward a narrow and technical interpretation of an Act intended to be construed in accordance with its broad and wise purpose."

As to the remedial character and legislative purpose of the Act, Edwin Borchard has eloquently spoken in the preface to the first edition of Borchard's Declaratory Judgments (Copyright 1934 by Banks, Baldwin Law Publishing Company of Cleveland, Ohio): "The utility of the declaratory judgment in the adjudication of conflicting claims between the citizen and the administration has not been fully appreci-

ated. It is not merely its speed, inexpensiveness, and simplicity which commend the declaration of rights in administrative law, nor the fact that it enables disputes to be determined in their incipency before they have grown into devastating battles and that a decision is obtainable without the prior necessity of a purported violation of law or a precarious leap in the dark. It is rather the fact (1) that administrative officials in the performance of their duties or in challenges to the validity of their acts require no coercive remedies or sanctions, but merely a declaration of their legal relations in order to remain, or be kept, within the bounds of legality; and (2) that the procedural vehicles by which administrative acts are submitted to judicial review, namely, the extra-ordinary legal remedies and injunction, have accumulated such a vast cargo of technicalities that the citizen desirous of challenging an administrative power or privilege finds himself frequently engulfed in a procedural bog which bars him from his goal. Nor has the officer under present practice any effective method of himself raising the issue of legality when challenged, for he must usually await the litigating initiative of

his adversary.

"Not the least of the advantages for a judicial declaration of rights over coercive forms of procedure is the possibility of adjudicating disputes on issues of law in simple, civilized fashion without violence or breach of economic and social relations. Legal positions can be effectively asserted, yet without cocksureness that makes defeat humiliating."

(C) The District Court had jurisdiction over the amended complaint under the Act of June 25, 1948, c. 646, 62 Stat 933 as revised into the Act of November 2, 1966, P. L. 89 - 719, Title II, Section 202 (a), 80 Stat. 1148, U. S. C. A. Title 28, Section 1346 (b).

The appellant devotes the major portion of the argument on the first point to the amended complaint.

While appellant assumes that objections to the Court's jurisdiction not raised either by the defendant - appellee or the Court in the original instance shall not be raised here, appellant wishes to emphasize that the Conclusions of the Report of the President's Commission act as a shield behind which a variety of illegal and quasi-legal activities, det-

rimental to the appellant, take place, regardless of the date those conclusions were entered. These acts were at least partially contemplated on the basis of the projected conclusions even before the official conclusions of the Report were entered. In other words, the relevant acts were necessarily dependent upon the erroneous conclusions of the Commission. It is as if on September 24, 1964 a field was mined and in the summer of 1966 the charges began to explode.

They continue to explode to the present day. Mark Lane, William Manchester, James Garrison, and a host of lesser nobles populate a thicket through which the appellant can wade only upon clearing the record with respect to what happened on November 22, 1963.

This will be settled upon judicial review.

But, in truth, the appellant has been adversely affected by a related conspiracy since 1959, and judicial review which does not take into account liquidated damages places a tremendous strain upon the appellant's resources.

In assessing the value of his claim for liquidated damages under U. S. C. A. Title 28, Section

1346 (b) appellant has based the evaluation on the relevant occurrences in the period encompassing roughly the summer of 1966 to the time that the claim was filed — that is an evaluation based upon the injury done the appellant within this period resulting from the fraudulent behavior of agents of the President's Commission aided and abetted by the Conclusions of the Report.

The United States is not exempt from liability in relation to the consequences of this particular fraud.

By the Act of June 25, 1948, c.. 646, Section 1, 62 Stat 984, U. S. C. A. Title 28, Section 2680 (h), the provisions of U. S. C. A. Title 28, Section 1346 (b) do not apply to "any claim arising out of assault, battery, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." But as reported in *Panella v. U. S.* (216 F. 2d 622) it was pointed out to the Senate Committee which considered the above exceptions before adoption that 2680 (h) was proposed precisely because Government employees committing any of the acts specified were either suable in their private capacities or other

remedies were available. Quoting the language of *Panella v. U. S.* (supra): "For example it may be said that the 2680 (h) exceptions were prompted by the thought that high standards of public service would be promoted by government employees knowing that they could not engage in such lawless activities at government expense.

"... In the hearings before the Senate Committee in the 76th Congress, the representative of the Department of Justice referred to the assault and battery exception as follows: 'Clause 9 proposes to exclude from the cognizance of the law claims arising out of assault, battery, false arrest, and so forth, a type (sic) of torts which would be difficult to make a defense against, and which are easily exaggerated. For that reason it seemed to those who framed this bill that it would be safe to exclude those types of torts, and those should be settled on the basis of private acts.' "

The present claim grows out of negligence. It is the result of the failure to exercise due care on the part of those charged with the execution of Executive Order Number 11130. And clearly, it falls within the scope of 1346 (b).

The question remains as to whether or not the claim was properly before the Court since it was prescribed on amendment and particularized only upon objection by the appellee to the Court's jurisdiction.

In the United States v. Association of American Railroads, D. C. Neb. 4 F. R. D. 510, it was held that (1) the law recognizes "capacity to sue" as plaintiff's personal right to come into court; and (2) a defendant cannot impeach by affidavits in support of his motion to dismiss for failure to state a valid claim, the essential allegations of a complaint and thereby in effect force a plaintiff to summary trial, even without necessity of answer, upon matters of fact specifically averred in complaint.

Thus it may be inferred that upon the filing by the appellee of the pleading Memorandum Of Law appellant had a personal right and the complaint ought not to have been dismissed before a reasonable time had been granted for the filing of an answer. And although the complaint was dismissed on the same day that the answer was filed, appellant assumes that all appropriate pleadings were considered on the motion to dismiss.

Granted then that the pleadings were properly before the Court, did the complaint, as amended, constitute a "new" cause of action in the sense that it would require the appellant to begin all over?

In the light of the liberal interpretation customarily granted the Federal Rules of Civil Procedure this is clearly not the case. And it might be added that the spirit of flexibility as reflected in this liberal interpretation has in the past not been entirely lost on the United States District Court For The District Of Columbia, as in Hill Lanham, Inc. v. Lightview Development Corporation (163 F. Supp. 475) and in Federal Looseleaf Corporation v. Woodhouse Stationary Company (163 F. Supp 482) where plaintiffs in each instance qualified to maintain their actions only after the defendants had filed motions to dismiss.

In Chisholm v. Gilmer (299 U. S. 99) it was held that the Constitution "does not prescribe the method of beginning civil cases at law, beyond requiring reasonable notice and a fair opportunity to be heard before the issues are determined." And in Hackner et al v. Guaranty Trust (117 F. 2d 95) where all of the plaintiffs except one were dis-

charged for lack of jurisdictional amount, Judge Clark stated at Page 98, "This disposes of the case as to all of the plaintiffs except Eastman. Since she alleges grounds of suit in the Federal Court, the only question is whether or not she must begin a new suit again by herself. Defendant's claim that one cannot amend a nonexistent action is purely formal, in the light of the wide and flexible content given the concept of action under the new rules. Actually she has a claim for relief, an action in that sense; and as the Supreme Court has pointed out, there is no particular magic in the way it is instituted. Chisholm v. Gilmer, 299 U. S. 99, 57 S. Ct. 65, 81 L. Ed. 458, upholding a suit instituted by mere motion for judgment."

(2) Complaint should not have been dismissed for failure to state a claim for which relief could be granted since plaintiff stated a valid claim within the meaning of the relevant statutes.

From Corpus Juris Secundum, Volume 35 B, Page 123, Section 824: "For purposes of a motion to dismiss a complaint, the prayer for relief may be disregarded; the question is not whether the relief sought can be granted, but whether any relief can be granted."

Under the Federal Rules of Civil Procedure, Rule 54 (c) 28 U. S. C. A., providing that except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if a party has not demanded such relief in his pleadings, a complaint is sufficient, and not to be dismissed, if it shows that the plaintiff is entitled to any relief which the court can grant, regardless of whether it asks for the proper relief."

Complaint alleged in the original instance that appellant was adversely affected by activities related to the conspiracy to assassinate President Kennedy, and that the Conclusions of the Report of the President's Commission did not accurately reflect that conspiracy or the conditions under President Kennedy was killed.

Was it within the power of the Court to grant any relief?

Appellant alleged in the Clarification of Issues, JA - 23, that members of the President's Commission did collaborate with Mark Lane, in such a manner as to lay the groundwork for the future manipulation of

the literary market. And in fact the market was actually manipulated largely on the basis of that collaboration and the literary endeavors of the appellant were thereby compromised.

Was it within the power of the Court to grant any relief?

The answer to the question is clearly affirmative in both instances and requires no elaboration.

(3) Plaintiff having stated a valid claim and jurisdiction being conferred by statute upon the District Court, complaint should not have been dismissed before the plaintiff had been granted an opportunity to establish his case.

This is a matter of right. Indeed, Mr. Justice White in delivering the opinion of the Court in Hovey v. Elliot (167 U. S. 409) stated at page 414: "To say that the courts have inherent power to deny all right to defend an action and render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

Mr. Justice White in the aforementioned opinion called attention to Windsor v. McVeigh, 93 U. S. 274, in which Mr. Justice Field stated: "The principle stated in this terse language lies at the foundation of all well ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice recognized as such by the common intelligence of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization over the subject matter. But notice is only for the purpose of being heard upon the claim or the charges made; it is a summons for him to appear and speak, if he has anything to say, why the judgment sought should not

be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to any notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, appear and you shall be heard; and when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

Mr. Justice Holmes, delivering the opinion of the Court in Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers, Attorney General, Successor to the Alien Property Custodian, 357 U. S. 197, citing the opinion in Windsor v. McVeigh (supra) in addition to that of Hammond Packing Company v. Arkansas, 312 U. S. 322, stated, "These decisions establish that there are Constitutional limitations on the power of Courts, even in the aid

of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

(4) Complaint should not have been dismissed with prejudice since there had been no adjudication on the merits.

It is well established (Glo Company v. Murchison, 208 F. 2d 714) that generally a dismissal should be without prejudice where there has been no adjudication of the merits.

Appellant concedes that there may be circumstances where a complaint should be dismissed with prejudice on a motion to lack of jurisdiction or even failure to state a claim for which relief could be granted. But here, outside of submitting a motion to dismiss on the above grounds and a pleading in support thereof, appellee never addressed the District Court. No pre-trial date was ever set. No testimony and no depositions were taken. The question of jurisdiction was never raised by the Court. Appellant is aware of no conceivable basis for a dismissal with prejudice.

(5) Dismissal with prejudice was improper in an order which set forth no grounds for dismissal.

Here appellant simply quotes from the opinion of Judge Sparks in Topping v. Fry, 117 F. 2d 95.

"Without permitting oral argument or granting plaintiff an opportunity to amend his complaint if he so desired, the court dismissed the complaint summarily, making no statement as to which of the diverse grounds stated by the two defendants in their motions to dismiss it relied upon as a basis for its action. Of course this dismissal acted as a dismissal with prejudice, and that being the case, we think plaintiff was entitled to know on what grounds the action was based."

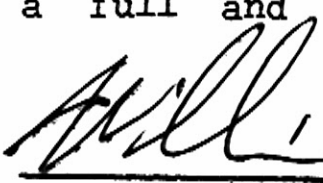
Conclusion. Appellant concludes therefore that a valid cause of action exists within the meaning of statutes authorizing suit against the United States.

Appellant makes note of the fact that under the Act of June 25, 1948, c. 646, Section 1, 62 Stat. 984, U. S. C. A. Title 28, Section 2677, the Attorney General may settle any claim cognizable under U. S. C. A. Title 28, Section 1346 (b) at any time with the permission of the Court.

Accordingly, and in the absence of an appropriate request by the Attorney General, appellant asks that

the case be remanded for a full and fair hearing
in the District Court.

(Signed)


Appellant

BRIEF FOR THE APPELLEE

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,121

WILLIAM R. SMITH, APPELLANT

v.

UNITED STATES, APPELLEE

On Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 8 1967

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Acting Assistant Attorney General.

MEYER ROTHWACKS,
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Washington, D. C. 20530.

Nathan J. Paulson
CLERK

STATEMENT OF QUESTION PRESENTED

In the opinion of the appellee, the question is whether appellant's complaint, seeking damages from the Government because by its alleged negligence and conspiracy it has deprived him of a potential market for his publications about the Kennedy assassination, was correctly dismissed by the District Court for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief could be granted.

II

INDEX

	Page
Statement of question presented	I
Index	II
Counter-statement of case	1
Statutes involved	3
Summary of argument	5
Argument:	
I. The District Court correctly dismissed appellant's complaint for lack of subject-matter jurisdiction	5
II. Assuming, arguendo, the District Court had jurisdiction, appellant's complaint was correctly dismissed for failure to state a claim upon which relief could be granted	8
Conclusion	9

CITATIONS

Cases:

<i>Balistreri v. United States</i> , 303 F. 2d 617	7
<i>Cadillac Publishing Co. v. Summerfield</i> , 227 F. 2d 29, 97 U.S. App. D.C. 14, certiorari denied, 350 U.S. 901	7
<i>Chournos v. United States</i> , 355 F. 2d 918	7
* <i>Conley v. Gibson</i> , 355 U.S. 41	9
<i>Continental Bank and Trust Co. v. Martin</i> , 303 F. 2d 214, 112 U.S. App. D.C. 354	7
<i>Day, Francis O., Co. v. Shapiro</i> , 267 F. 2d 669, 109 U.S. App. D.C. 392	9
* <i>Dollar v. Land</i> , 154 F. 2d 307, 81 U.S. App. D.C. 28, affirmed 330 U.S. 731	8
<i>Enochs v. Williams Packing & Navigation Co.</i> , 291 F. 2d 402	7
<i>Kansas City Power & Light Co. v. McKay</i> , 225 F. 2d 924, 96 U.S. App. D.C. 273, certiorari denied, 350 U.S. 884	6-7
<i>Reid v. United States</i> , 211 U.S. 529	6
* <i>United States v. Shaw</i> , 309 U.S. 495	6

Statutes:

Internal Revenue Code of 1954, Sec. 7421 (26 U.S.C. 1964 ed., Sec. 7421)	3
Revised Statutes, Sec. 1980 (42 U.S.C. 1964 ed., Sec. 1985)	6

Statutes—Continued	Page
5 U.S.C., Sec. 703	6
5 U.S.C., Sec. 704	6
28 U.S.C.:	
Sec. 1343	6
Sec. 1346	3, 6, 7
Sec. 2201	6
Sec. 2680	4, 7, 8

* Cases or authorities chiefly relied upon are marked by asterisks.

IN THE
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On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE APPELLEE

COUNTER-STATEMENT OF CASE

Because the appellant's statement of case is in some respects inaccurate and unclear, the Government believes a counter-statement will be helpful.

Appellant filed a complaint in the District Court alleging that the Government conspired to deprive him of a potential market for his publications about the Kennedy assassination. This alleged conspiracy seems to have existed, in appellant's view, because the Government, through agencies responsible for investigating and reporting upon the assassination, presented an account of the

assassination which differed from appellant's published theories. (JA 2-7.)

The complaint asked the District Court to enjoin the collection of certain federal taxes owed by appellant "until such time as he has sufficient independent capital to promote the sale * * *" of a book allegedly written by appellant, "or, alternately [sic], until the Government of the United States adjusts its official findings in connection with the Kennedy assassination to correspond with the evidence," in which case the appellant should be allowed a reasonable time "to adjust any settlement with the Internal Revenue Service to a schedule that takes in account obligations he has already incurred." (JA 7.)

Along with the complaint, appellant filed both a motion, which requested the same relief set out in the complaint, and an application for a temporary restraining order against the Internal Revenue Service to prevent "interference with any income" due appellant. (JA 8-11.)* Thereafter, appellant filed a "Motion for Declaratory Judgment", with supporting affidavit, seeking damages of \$100,000. These documents contain basically the same allegations found in the complaint. (JA 12-18.) The District Court entered an order denying the motion. (JA 19.)

Appellant then filed an amendment to his complaint (1) providing for incorporation of the above-mentioned affidavit into the complaint, (2) striking the reference in that affidavit to the "Motion for Declaratory Judgment", (3) urging that the case was now one "for equity under the Tort Claims Act", and (4) changing "the character of the relief sought * * * from injunctive relief to that of financial judgment against the defendant in the sum of two hundred and fifty thousand dollars (\$250,000.00)." (JA 20.)

* While not a part of the official record, it appears that on February 10, 1967, Judge Bernita Sheldon Mathews, after oral argument, denied appellant's pendente lite requests for a temporary injunction, temporary restraining order and refund of money allegedly seized.

At this stage in the proceedings, the Government moved to dismiss the complaint with prejudice on the grounds that the District Court lacked jurisdiction over the subject matter and that the appellant had failed to state a claim upon which relief could be granted. (JA 21.) In response to the Government's motion, appellant filed a document entitled "Clarification of Issues" which repeated his previous allegations and added that the Government, in some undisclosed manner, had failed to exercise "due care". (JA 23-25.) The District Court granted the motion to dismiss the complaint with prejudice. (JA 26.)

STATUTES INVOLVED

While appellant's brief contains some of the statutes set forth below, all of the relevant statutes are here set forth in the interest of clarity.

Internal Revenue Code of 1954:

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax*.—Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * *

(26 U.S.C. 1964 ed., Sec. 7421.)

28 U.S.C.:

§ 1346. *United States as defendant.*

(a) [as amended by Sec. 1, Act of July 30, 1954, c. 648, 68 Stat. 589] The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to

have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(b) [as amended by Sec. 2, Act of April 25, 1949, c. 92, 63 Stat. 62] Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * *

§ 2680. *Exceptions.*

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * *

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

* * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

* * * *

SUMMARY OF ARGUMENT

The District Court correctly dismissed appellant's complaint because the Court had no jurisdiction over the subject matter of the suit. Suits against the United States are permitted only with statutory consent which confers jurisdiction on a particular court. Appellant has failed to point to any statute which could reasonably be construed to permit adjudication of his extravagant claim.

Assuming, *arguendo*, that the District Court had jurisdiction, the complaint was nevertheless correctly dismissed since appellant failed to state a claim upon which relief could be granted. His claim for damages, grounded on the Government's alleged conspiracy and negligence in presenting an account of the Kennedy assassination which differed from his published theories, is obviously frivolous and does not state a cause of action under any statute or legal theory.

ARGUMENT

I

The District Court Correctly Dismissed Appellant's Complaint for Lack of Subject-Matter Jurisdiction

The question presented by this appeal may be disposed of by application of a traditional and basic jurisdictional principle. The United States, a sovereign entity, may not

be sued without specific and express statutory consent. See, e.g., *Reid v. United States*, 211 U.S. 529 (1909); *United States v. Shaw*, 309 U.S. 495 (1940). Absent statutory consent, there is no subject-matter jurisdiction. *United States v. Shaw*, *supra*, pp. 500-501, 503. Nothing in appellant's pleadings or in his brief suggests the existence of any statute reasonably manifesting the Government's consent to subject itself to the unusual claim in this suit. Nor does appellant suggest any legal theory supporting a possible cause of action, much less a suit cognizable under any statute.

With the possible exception of 28 U.S.C., Section 1346 (b), *supra* (a basic provision of the Tort Claims Act), all of the statutes cited by appellant as supporting jurisdiction in this case are by their terms plainly inapplicable. See, e.g., Section 1980, Revised Statutes (42 U.S.C. 1964 ed., Sec. 1985) (which creates a civil action in favor of an individual who is injured by specified conspiracies to interfere with his civil rights); 28 U.S.C., Section 1343 (which confers jurisdiction upon the District Court to hear any civil action authorized by law to recover damages for injuries suffered by reason of the conspiracies mentioned in Section 1980, Revised Statutes); and 28 U.S.C., Section 1346(a)(2), *supra* (which confers jurisdiction upon the District Court to hear civil actions against the United States, not exceeding \$10,000, founded upon the Constitution, any Act of Congress, or any contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort). Moreover, two of the statutes cited by appellant are remedial, not jurisdictional. Thus, 5 U.S.C., Sections 703 and 704 (Administrative Procedure Act), provides federal judicial review of specified agency actions in courts of competent jurisdiction, and 28 U.S.C., Section 2201 (Declaratory Judgment Act), provides that United States courts may declare legal rights and relations in cases of actual controversy within their jurisdiction, except with respect to Federal taxes. See *Kansas City Power & Light Co. v.*

McKay, 225 F. 2d 924, 932-933, 96 U.S. App. D.C. 273 (1955), certiorari denied, 350 U.S. 884 (1955) (Administrative Procedure Act); *Cadillac Publishing Co. v. Summerfield*, 227 F. 2d 29, 97 U.S. App. D.C. 14 (1955), certiorari denied, 350 U.S. 901 (1955); *Continental Bank and Trust Co. v. Martin*, 303 F. 2d 214, 112 U.S. App. D.C. 354 (1962) (Declaratory Judgment Act). These statutes do not create consent to suits against the United States. *Chournos v. United States*, 335 F. 2d 918, 919 (C.A. 10th 1964) (Administrative Procedure Act); *Balistreri v. United States*, 303 F. 2d 617, 619 (C.A. 7th 1962) (Declaratory Judgment Act).

Appellant asserts here, as he did below, that his claim is cognizable under the Tort Claims Act, 28 U.S.C., Section 1346(b), by which, concededly, the United States has consented to be sued, but only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the wrongful act or omission occurred." Given this limitation, appellant has patently failed to set forth any legal basis to support his claim.

In his pleadings appellant irrelevantly refers to an alleged levy made upon his salary by the Internal Revenue Service for the purpose of collecting federal taxes. (JA 5-6, 15.) However, this suit is obviously not one involving the assessment or collection of federal taxes. Indeed, appellant appears to admit his tax liability. (JA 5-6, 15; Br. 4, 9.) Even if the suit involved federal taxes, injunctive relief, except in extraordinary circumstances, is precluded by statute. Section 7421(a), Internal Revenue Code of 1954, *supra*; *Enochs v. Williams Packing & Navigation Co.*, 291 F. 2d 402 (C.A. 5th 1961). Furthermore, Section 1346(b), *supra*, of the Tort Claims Act has no application to any claim arising in respect of the assessment or collection of any tax. 28 U.S.C., Section 2680(c), *supra*. Compare 28 U.S.C., Section 1346(a)(1), *supra*.

Appellant's primary contention appears to be that he has sustained a loss of income by reason of a conspiracy among, and the negligence of, certain Government agents, resulting in the suppression and distortion of evidence concerning the Kennedy assassination, and creating a controversy causing competitive books about the assassination to thrive and somehow reducing the market for appellant's publication. Appellant's logic escapes the Government; no lengthy discourse on the essential elements of conspiracy or negligence appears warranted. Appellant's frivolous contentions do not even suggest a recognizable cause of action, least of all one under the Tort Claims Act. Cf. 28 U.S.C., Section 2680(a) and (h), *supra*; *Dollar v. Land*, 154 F. 2d 307, 81 U.S. App. D.C. 28 (1946), affirmed, 330 U.S. 731 (1947).

II

Assuming, *Arguendo*, the District Court Had Jurisdiction, Appellant's Complaint Was Correctly Dismissed for Failure to State a Claim Upon Which Relief Could Be Granted

Assuming, *arguendo*, that the District Court had jurisdiction over appellant's claim, the complaint was still correctly dismissed since appellant failed to state a claim upon which relief could be granted.

Appellant has not alleged any act or omission by the United States, its agents or officers, resulting in tortious harm to appellant. Nor has he alleged that the Government has attempted in any way to suppress his publications or encroach upon any of his rights.

Appellant's only grievance appears to be that his theories about the assassination of President Kennedy were not adopted by the Government agency appointed to investigate and report upon the assassination. Of course, appellant has the right to express his views on that tragedy, but he obviously has no right to a windfall in damages merely because his views are not adopted by the

Government. In sum, appellant has alleged no facts which would support any claim entitling him to relief. Cf. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Francis O. Day Co. v. Shapiro*, 267 F. 2d 669, 109 U.S. App. D.C. 392 (1959).

CONCLUSION

The District Court's order dismissing the complaint should be affirmed.

Respectfully submitted,

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SEPTEMBER, 1967.